AMERICAN BAR ASSOCIATION

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STATEMENT

of

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Chair

STANDING COMMITTEE ON ETHICS
AND PROFESSIONAL RESPONSIBILITY

on behalf of the

AMERICAN BAR ASSOCIATION

before the

Subcommittee on Telecommunications, Trade and Consumer Protection

of the

Committee on Commerce

of the

UNITED STATES HOUSE OF REPRESENTATIVES

on the subject of

Contingency Fees in Product Liability Cases

April 30, 1997

Mr. Chairman and Members of the Subcommittee:

I want to thank you for the opportunity, Mr. Chairman, to speak before your subcommittee this morning on behalf of the American Bar Association. I am Lawrence Fox, Chair of the Standing Committee on Ethics and Professional Responsibility. The issue of contingent fees is an important one and we welcome the dialogue which will permit us to explain both the basis for and the contours of the ABA's continuing endorsement of the use of contingent fees.

I. The Purpose of Contineent Fees

In personal injury cases. a contingent fee agreement allows a lawyer to undertake representation of a plaintiff with the understanding that the fee is contingent on the outcome of the case. The fee is usually expressed as a percentage of the amount the plaintiff is awarded in the case. With a contingent fee, the attorney finances the litigation and is reimbursed for his or her services only if he or she wins the case, and then in direct proportion to the size of the recovery. No money for the plaintiff; no fee for the lawyer. Small recovery for the plaintiff; small fee for the lawyer. Large recovery for the plaintiff; large fee for the lawyer. Thus, the risk of receiving no return on the investment in litigation is shifted from the plaintiff to the lawyer. Contingent fee agreements are extensively used in the United States, particularly by plaintiffs in lawsuits involving personal injury, who might not have the means to pay the costs associated with a legal action on their own.

Contingent fees are essential to our system ofjustice because, unlike in most European democracies, the U.S. provides minimal civil legal aid or legal insurance. In addition, in comparison with these other countries, the U.S. provides far more limited publicly-funded social services for the injured persons. The contingent fee provides access to the courts for plaintiffs

who may have legitimate claims but are deterred from pursuing them by the cost and risk of retaining a lawyer on an hourly basis. Without contingent fees many of these people would be denied access to the courts.

II. Challenges to Contingent Fees

Unfortunately, the availability of the contingent fee is under direct attack. A variety of proposals have been offered including a) capping the fees or creating a sliding scale dependent on the size of the award recovered. b) placing special procedural requirements on those who are proceeding on a contingent basis. or c) dramatically limiting the amount of any contingency fee on the amount of a rejected settlement proposal. If these proposals were adopted, they could effectively abolish the contingent fee, and the access to the courts that comes with it. by making it so unprofitable to pursue a meritorious claim that lawyers will be unable to take such cases on a contingent basis.

In 1994, the ABA Standing Committee on Ethics and Professional Responsibility was asked to issue an opinion on contingency fees. An opinion addressing these proposals was released on December 5, 1994. Among its major conclusions were that "a lawyer entering into a contingent fee arrangement complies with the ethical standards set forth in both the Model Rules of Professional Conduct and the Model Code of Professional Responsibility if the fee is both appropriate and reasonable and if the client has been fully informed of all appropriate alternative billing arrangements and their implications. Contingent fee arrangements are appropriate for both the affluent and those who cannot otherwise afford the lawyer's services. It is not necessarily unethical to charge a contingent fee when liability is clear and some recovery is anticipated. A lawyer compensated on a contingent basis has no obligation to solicit on behalf of the client an

early settlement offer; further. she may collect a contingent fee on the total recovery, including any amount that was the subject of an early settlement offer. Finally, a lawyer may charge a different contingent fee at different stages of a matter, and may increase the percentage taken as a fee as the amount of the recovery or savings to the client increases."

A. Special Rules for Contingent Fee Plaintiffs

Specifically the opinion addressed proposals that would require the contingent fee client to make disclosure to the defendant of details regarding the nature of the claim and also require the contingent fee client to solicit an early offer from the defendant or defendants. The opinion concluded that the unfairness of this approach is manifest. There is no reciprocal requirement that the defendant provide early discovery to the plaintiff. And there is no reciprocal requirement for the defendant to make an early settlement offer. Thus, two decisions are mandated for the client who is represented by a lawyer on a contingent fee that are not required (a) for a client who is represented by a lawyer compensated or another basis, and (b) the defendant who is the opposing party.

There is no reason that a lawyer who is retained on a contingent fee basis and her client should be any less free than clients and their lawyers who are compensated on some other basis to proceed with normal discovery as provided under the applicable rules of civil procedure, and to decide whether and when to solicit or make a settlement offer. It is not fair to force clients and lawyers to follow any specific litigation strategy or approach based on the method by which the lawyer is to be compensated. All lawyers, whether working on an hourly basis, on a contingent basis or free of charge, should be free to exercise their independent professional judgment on behalf of their clients with respect to these and all litigation matters.

Forcing a plaintiff to make an early settlement offer works a particular hardship. At that juncture, the plaintiff, without the benefit of discovery, may not know the strength of her case and may not have enough information about the defendant's conduct to make an independent evaluation of the likelihood of success and the likelihood of obtaining exemplary damages. In addition, at the outset of the case, the plaintiffs damages may still be a matter of significant uncertainty, with respect to their extent and permanence or both. Finally, a plaintiff may have decided that she does not, under any circumstances, wish to settle or enter into settlement negotiations because she has determined that she wants her day in court. The plaintiff should be free to consider all of these matters without regard to the basis on which she is compensating her lawyer.

B. The Effect of Early Settlement Offers

The opinion also directly responded to a proposal that would prohibit a lawyer from collecting a contingent fee on the amount of an original settlement offer, even after the client rejects the offer, requiring the lawyer to take the case to trial (and perhaps appeal) and then recovering no more than what she was originally offered. The argument by the proposal's proponents goes that the lawyer added no value since the client could have received the same amount if she had accepted the offer. The opinion concluded that establishing such a rule would fail to recognize the substantial time and effort a lawyer is required to expend to undertake all of these services. It would also ignore the lawyer's assumption of the real risk that the client, after rejecting the offer, will recover nothing.

The opinion noted that this approach penalizes both the plaintiff and her lawyer in cases where, even though liability is clear, there is an honest disagreement between the parties as

to the amount owed in damages. Under those circumstances the plaintiff is entitled to reject the early offer and take her claim to a judge or jury represented by a fully compensated lawyer of her choosing. The circumstance that the fact finder eventually agrees with the defendant's evaluation of the case provides no ethical reason to interfere with a mutually agreed-upon contingent fee arrangement that was reasonable and appropriate at the onset of representation. Indeed, the plaintiffs lawyer is penalized even if the fact finder agrees with the plaintiffs valuation of the case, because the proposal would limit any fee on the portion of the judgment which equals the early settlement offer, even if much more is awarded after trial.

This interference with the normal fee arrangement is particularly inappropriate. the opinion found, given the fact that all decisions regarding the objectives of representation, including the acceptance and rejection of settlement offers, are solely those of the client. It is the lawyer who is bound by the client's decision, not the other way around. This proposal, however, results in the lawyer being penalized because she is required to pass on the client's rejection of the early offer and press forward with the litigation to a stage of the proceedings that the client chooses.

The argument for limiting contingent fees on the amount of an early offer seems to be based on the flawed assumption that by making an early offer the defendant is conceding all liability up to that amount, thereby eradicating the possibility of non-recovery by the plaintiff. But early settlement offers are made for numerous reasons besides a concession of liability. And as any experienced trial lawyer knows, once an early settlement offer is rejected, the defendant and its lawyer will, in most cases, do their best to defend both against the fact of liability and the amount of damages owed. There is generally a real risk to the client and to the lawyer who is to

be paid on a contingent fee basis that such a defense will be successful. It is ethical for the lawyer to be compensated for both the time she expends to defeat any such defenses and the risks she assumes (a) that the plaintiff will not prevail at trial, (b) that a judgment awarded may never be collected, (c) that the client will fire the lawyer, a right the client might exercise at any time, (d) that the client will insist on proceeding with the litigation through appeals or otherwise longer than the lawyer would proceed, if it were the lawyer's, rather than the client's, decision, and (e) the often lengthy delay between the time work is performed and the time a fee is received.

Critics of contingent fees, ignoring the risk lawyers assume, often criticize the amount of such fees based on a calculation of the hourly rates such fees sometimes generate. It is ironic then for these same critics to strip the contingent fee lawyer of the benefit of the early settlement offer portion of his fee, despite the fact that the lawyer will have dedicated significant time to accomplish it.

III. The ABA Perspective

The Committee acted with the knowledge that the ability of the American public to secure representation for their legitimate claims -- no matter how the Congress, the state legislatures and the courts shall define them -- is far too important a right to be compromised by those advancing proposals that will in effect make contingent fee agreements unavailable to Americans with meritorious claims. Our legal system is the envy of the world and the availability of lawyers prepared to take cases on a contingent basis is the living embodiment of our making "equal justice under law" not just words that are etched in the facade of the Supreme courts, but a concept that says, rich or poor, you may hire a lawyer to represent you with the lawyer's fee turning solely on the result

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This is not to say that legitimate concerns about fee arrangements should not be addressed. However. instead of relying on fee limitations, which create disincentives to litigating potentially meritorious cases, the ABA House of Delegates in February 1987, adopted the following recommendations directed to the courts and the lawyers to address these concerns:

> a) Fee arrangements with each party in tort cases should be set forth in a written agreement that clearly identifies the basis on which the fee is to be calculated. In addition. because many plaintiffs may not be familiar with the various ways that contingent fees may be calculated. there should be a requirement that the contingent fee information form be given to each plaintiff before a contingency fee agreement is signed. The content of the information form should be specified in each jurisdiction and should include at least the maximum fee percentage, if any, in the jurisdiction, the option of using different fee percentages depending on the amount of work the attorney has done in obtaining a recovery, and the option of using fee percentages that decrease as the size of a recovery increases. The form should be written in plain English. and, where appropriate, other languages.
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> b) Courts should discourage the practice of taking a percentage fee out of the gross amount of any judgment or settlement. Contingent fees should normally be based only on the net amount recovered after litigation disbursements such filing fees, deposition costs, trial transcripts, travel, expert witness fees, and other expenses necessary to

conduct the litigation.

c) Upon complaint of a person who has retained counsel. or who is required to pay counsel fees, the fee arrangement and the fee amount billed may be submitted to the court or other appropriate public body, which should have the authority to disallow, after a hearing, any portion of a fee found to be "plainly excessive" in light of prevailing rates and practices.

These recommendations were adopted in February 1987 as part of a broader set of recommendations aimed at improving the tort liability system at the state level. The broad set of recommendations is attached as Appendix "4."

IV. Answering the Critics

Beyond the specific proposals addressed in our opinion there are genera1 attacks on contingent fees that they generate frivolous litigation and result in unseemly recoveries by lawyers. Permit me to address these as well.

A. Contingent Fee Cases Have Merit

First, as I've already said. there are cases that would not be brought if contingent fees were not available. Nonetheless, there is no evidence that the claims that are brought under a contingent fee system are any less meritorious than cases brought on any other basis. That is not a surprising conclusion if you think about it. A lawyer who is paid on an hourly basis has no incentive to turn down a claim even if it is of only marginal merit. Once that lawyer fulfills his obligation to explain to the client what a bad investment the client might be making, that lawyer is free, and may even be ethically compelled, to proceed with the case if that is the client's wish.

On the other hand. a contingent fee lawyer faced with the same high risk case knows that

her time will only be compensated if her client recovers. She will have to think long and hard about whether to accept the engagement. Research indicates that contingent fee lawyers typically turn down well over half of the cases offered to them simply because they view them as not justifying the risk. In medical malpractice they turn down seven of eight. Thus, if anything, lawyers acting on a contingent fee basis provide a valuable gatekeeper function, shunting out of the system (or at least out of their offices) a large number of cases that might otherwise be brought. Indeed, the real sin here, if sin there be, is that some truly meritorious cases, perhaps cases whose merit would only be uncovered as a result of discovery, never get brought and those poor clients' wrongs never get vindicated. because at the outset those cases don't look like they are worth the trouble.

B. Contingent Fees Are Reasonable

Second, there is the hue and cry over the windfall recoveries that lawyers make in contingent fee cases. Empirical studies on this topic demonstrate that these charges are groundless. Contingent fee lawyers are compensated slightly better than all other lawyers on a per hour basis for cases that they win. Factoring in the cases for which they do not get compensated at all and the time value of money (since these lawyers earn nothing until the case is concluded), one finds that on average contingent fee lawyers are doing no better than their hourly fee counterparts.

This is not to say that from time to time there are not a few highly celebrated cases in which on a per hour basis lawyers make a great deal of money. This happens sometimes because of a surprisingly early settlement. It happens at other times because of a surprisingly large verdict. However, the fact that it happens does not mean that those lawyers have acted

unethically or that the fees they receive are unreasonable. In fact, it is quite surprising that the critics of contingent fees spend so much time trying to calculate the per hour compensation of the lawyers involved. The whole purpose of contingent fees is to get away from hourly billing, a practice which itself has been criticized because of the incentive it provides them to chum hours. The measure of the contingent fee lawyer's effectiveness, rather, is the result achieved and it is solely on that basis that the lawyer is compensated. Many in our society, not just lawyers, charge on this basis and I have heard not one of the critics of contingent fees for lawyers condemn investment bankers, movie producers or authors, all of whom are typically compensated based on the economic result of their activity, not on the number of hours they devote to it.

C. Contingent Fees are Widespread

Third. this criticism of contingent fees arises at a time when clients, even those clients who could pay hourly rates, are increasingly using the contingent fee as an appropriate method for compensating lawyers. Major corporations are hiring lawyers to press claims on their behalf on a contingent fee basis, corporate lawyers are often hired now with at least part of their compensation contingent on a successful takeover or merger, and even reverse contingent fees are being used in the representation of defendants. This is happening because clients believe that the contingent fee is a way of more closely tying the lawyer's fortunes to those of the client. It is also a reaction to perceived abuses in the other major basis for compensating lawyers - the hourly rate. When a lawyer is hired on a contingency, there is no second guessing either the staffing choices that are made or the hours dedicated to the project.

V. Conclusion

Thank you for giving us this opportunity to present our views to you. We hope you understand the importance of contingent fees to our system ofjustice and how the critics of contingent fees have little factual support for their attacks and that their proposals would seriously undermine access to the courts.

RESOLUTION APPROVED
AMERICAN BAR ASSOCIATION
HOUSE OF DELEGATES

February 16-17, 1987
(Report No. 123)

BE IT RESOLVED, That the American Bar Association adopts the following recommendations:

A. Insurance

1. The American Bar Association should establish a commission to study and recommend ways to improve the liability insurance system as it affects the tort system.

B. Pain and Suffering Damages

2. There should be no ceilings on pain and suffering damages, but instead trial and appellate courts should make greater use of the power of remittitur or additur with reference to verdicts which are either so excessive or inadequate as to be clearly disproportionate to community expectations by setting aside such verdicts unless the affected parties agree to the modification.

3. One or more tort award commissions should be established, which would be empowered to review tort awards during the preceding year, publish information on trends, and suggest guidelines for future trial court reference.

4. Options should be explored by appropriate ABA entities whether additional guidance can and should be given to the jury on the range of damages to be awarded for pain and suffering in a particular case.

C. Punitive Damages

5. Punitive damages have a place in appropriate cases and therefore should not be abolished. However, the scope of punitive damages should be narrowed through the following measures:

a. Standards of Conduct and Proof

Punitive damages should be limited to cases warranting sanctions and should not be commonplace. A threshold requirement for the submission of a punitive damages case to the finder of fact should be that the defendant demonstrated a conscious or deliberate disregard with respect to the plaintiff. As a further safeguard, the standard of proof to be applied should be "clear and convincing" evidence as opposed to any lesser standard such as "by a preponderance of the evidence."

b. The Process of Decision

(1) Pre-Trial -- Appropriate pre-trial procedures should be routinely utilized to eliminate frivolous claims for punitive damages prior to trial, with a savings mechanism available for late discovery of misconduct meeting the standard of liability.

(2) Trial -- Evidence of net worth and other evidence relevant only to the question of punitive damages ordinarily should be introduced only after the defendant's liability for compensatory damages and the amount of those damages have been determined.

(3) Post-Trial -- As a check against excessive punitive damage awards, verdicts including such awards should be subjected to close scrutiny by the courts. The trial court should order remittitur wherever justified. Excessiveness should be evaluated in light of the degree of reprehensibility of the defendant's acts, the risk undertaken by the plaintiff, the actual injury caused. the net worth of the defendant. whether the defendant has reformed its conduct and the degree of departure form typical ratios (as reflected in the best available empirical data) between compensatory and punitive damages. If necessary to assure such judicial review, appropriate legislation should be enacted. Opinions issued by trial or appellate courts either upholding or modifying an award should specify the factors which were considered and relied upon.

c. Multiple Judgment Torts

While the total amount of any punitive damages awarded should be adequate to accomplish the purpose of punitive damages, appropriate safeguards should be put in force to prevent any defendant from being subjected to punitive damages that are excessive in the aggregate for the same wrongful act.

d. Vicarious Liability

With respect to vicarious liability for punitive damages, the provisions of Section 909 of the Restatement (Second) of Torts 1979 should apply. Legislatures and courts should be sensitive to adopting appropriate safeguards to protect the master or principal from vicarious liability for the unauthorized acts of non-managerial servants or agents.

e. To Whom Awards Should Be Paid

In certain punitive damages cases, such as torts involving possible multiple judgments against the same defendant. a court could be authorized to determine what is a reasonable portion if the punitive damages award to compensate the plaintiff and counsel for bringing the action and prosecuting the punitive damage claim, with the balance of the award to be allocated to public purposes, which could involve methods of dealing with multiple tort claims such as consolidation of claims or forms of class actions. The novelty of such proposals and the absence of any adequately tested programs for implementing require further study before an informed judgment can be made as to whether, or to what extent, such proposals will work in practice. We urge such studies. The concept of public allocation of portions of punitive damage awards in single judgment actions is also worthy of consideration to the extent workable methods of implementation may hereafter be developed.

D. Joint -and- Several Liability

6. The doctrine of joint -and- several liability should be modified to recognize that defendants whose responsiblity is substantially disproportionate to liability for the entire loss suffered by the plaintiff are to be held liable for only their equitable share of the plaintiffs noneconomic loss, while remaining liable for the plaintiffs full economic loss. A defendant's responsibility should be regarded as "substantially disproportionate" when it is significantly less than any of the other defendants: for example. when one of two defendants is determined to be less than 25% responsible for the plaintiffs injury.

E. Attornevs' Fees

7. Fee arrangements with each party in tort cases should be set forth in a written agreement that clearly identifies the basis on which the fee is to be calculated. In addition, because many plaintiffs may not be familiar with the various ways that contingency fees may be calculated, there should be a requirement that the contingency fee information form be given to each plaintiff before a contingency fee agreement is signed. The content of the information form should be specified in each jurisdiction and should include at least the maximum fee percentage, if any, in the jurisdiction, the option of using different fee percentages depending on the amount of work the attorney has done in obtaining a recovery and the option of using fee percentages that decrease as the size of the recovery increases. The form should be written in plain English, and, where appropriate, other languages.

8. Courts should discourage the practice of taking a percentage fee out of the gross amount of any judgment or settlement. Contingent fees should normally be based only on the net amount recovered after litigation disbursements such as filing fees, deposition cost, trial transcripts, travel, expert witness fees, and other expenses necessary to conduct the litigation.

9. Upon complaint of a person who has retained counsel, or who is required to pay counsel fees, the fee arrangement and the fee amount billed may be submitted to the court or other appropriate public body, which should have the authority to disallow, after a hearing, any

portion of a fee found to be "plainly excessive" in light of prevailing rates and practices,

F. Secrecy and Coercive Agreements

10. Where information obtained under secrecy agreements (a) indicates risk of hazards to other persons. or (b) reveals evidence relevant to claims based on such hazards, courts should ordinarily permit disclosure of such information, after hearing, to other plaintiffs or to government agencies who agree to be bound by appropriate agreements or court orders to protect the confidentiality of trade secrets and sensitive proprietary information.

11. No protective order should contain any provision that requires an attorney for a plaintiff in a tort action to destroy information or records furnished pursuant to such order, including the attorney's notes and other work product, unless the attorney for a plaintiff refuses to agree to be bound by the order after the case has been concluded. An attorney for plaintiff should only be required to return copies of documents obtained from the defendant on condition that defendant agrees not to destroy any such documents so that they will be available, under appropriate circumstances. to government agencies or to other litigants in future cases.

12. Any provision in a settlement or other agreement that prohibits an attorney from representing any other claimant in a similar action against the defendant should be void and of no effect. An attorney should not be permitted to sign such an agreement or request another attorney to do so.

G. Streamlinine the Litigation Process: Frivolous Claims and Unnecessary Delay

13. A "fast track" system should be adopted for the trial of tort cases. In recommending such a system, we endorse a policy of active judicial management of the pre-trial phases of tort litigation. We anticipate a system that sets up a rigorous pre-trial schedule with a series of deadlines intended to ensure that tort cases are ready to be placed on trial calendar within a specified time after tiling and tried promptly thereafter. The courts should enforce a firm policy against continuances.

14. Steps should be taken by the courts of the various states to adopt procedures for the control and limitation of the scope and duration of discovery in tort cases. The courts should consider, among other initiatives:

(a) At an early scheduling conference, limiting the number of interrogatories any party may serve, and establishing the number and time of depositions according to a firm schedule. Additional discovery could be allowed upon a showing of good cause.

(b) When appropriate, sanctioning attorneys and other persons for abuse of discovery procedures.

15. Standards should be adopted substantially similar to those set forth in Rule-1 1 of the Federal Rules of Civil Procedure as a means of discouraging dilatory motions practice and

frivolous claims and defenses

16. Trial judges should carefully examine, on a case -by- case basis. whether liability and damage issues can or should be tried separately.

17. Nonunanimous jury verdicts should be permitted in tort cases such as verdicts by five of six or ten of twelve jurors.

18. Use of the various alternative dispute resolution mechanisms should be encouraged by federal and state legislatures, by federal and state courts, and by all parties who are likely to, or do become involved in tort disputes with others.

H. Injury Prevention/Reduction

19. Attention should be paid to the disciplining of all licensed professionals through the following measures:

(a) A commitment to impose discipline, where warranted. and funding of full-time staff for disciplinary authorities. Discipline of lawyers should continue to be the responsibility of the highest judicial authority in each state in order to safeguard the rights of all citizens.

(b) In every case in which a claim of negligence or other wrongful conduct is made against a licensed professional. relating to his or her profession. and a judgment for the plaintiff is entered or a settlement paid to an injured person, the insurance carrier, or in the absence of a carrier, the plaintiffs attorney, should report the fact and the amount of payment to the licensing authority. Any agreement to withhold such information and/or to close the files from the disciplinary authorities should be unenforceable as contrary to public policy.

I. Mass Tort

20. The American Bar Association should establish a commission as soon as feasible, including members with expertise in tort law. insurance, environmental policy, civil procedure. and regulatory design, to undertake a comprehensive study of the mass tort problem with the goal of offering a set of concrete proposals for dealing in a fair and efficient manner with these cases.

J. Concluding Recommendation

2 1. After publication of the report, the ABA Action Commission to Improve the Tort Liability System should be discharged of its assignment.

* With the possible exception relating to mass torts, the ABA takes the position that these proposals to improve the tort system can and should be implemented by the courts and legislatures at the state and not the federal level.